BOOK OF AUTHORITIES

Cases	**TAB**
Bennett, Re [1972] N.J. No. 38 (Nfld. S.C.)	**1**
Housen v. Nikolaisen, [2002] 2 S.C.R. 235 [Tab 1 of CFS's Book of Authorities]	
Jacob Farms Ltd. v. Jacobs [1992] OJ No 813 at 5 Ont Gen Div [Tab 5 of CFS's Book of Authorities]	
Reaburn v. Lorje, 2000 SKQB 81	**2**

2 Nfld. & P.E.I.R. 543

1972 CarswellNfld 13

Bennett, Re

Re Bennett

Newfoundland Supreme Court, Trial Division

Furlong, C.J., and Mifflin, J.

Judgment: January 11, 1972

Counsel: N. S. Noel, Q.C., and P. Derek Lewis, Q.C., for the Petitioner.

James J. Greene, Q.C., William W. Marshall, and Thomas J. O'Reilly, for Edward Maynard, one of the Respondents.

Melvin Gilley, the other respondent, not represented by Counsel or in person.

Subject: Public

Furlong, C.J.:

1 This petition by Trevor Bennett, the unsuccessful candidate in the District of St. Barbe South at the Newfoundland General Election on October 28th, 1971, complaining of no return, prays that the Court declare the election in that district void. The petition is opposed by Edward Maynard, the successful candidate, who asks us to reject the prayer to declare the election void and to declare him to be duly elected as the Member of the House of Assembly for the district.

2 The complaints of the petitioner have nothing to do with the actual conduct of the election itself. Voting took place properly, there are no allegations of illegal or improper actions on the part of any of the election officials or of anyone else concerned with the election; no corruption, no personation, no voting by unqualified voters; none, of what I may call the usual features of an election petition. What the petitioner does complain of, is the impossibility of a judicial recount because of the premature destruction of the ballots in one polling station after they had been counted and a Statement of the Poll issued by the Deputy Returning Officer in charge of that booth. I emphasize, as I believe does Mr. Justice Mifflin in his judgment herein, that nothing is complained of until the voting and counting of the ballots had been completed. Mr. Justice Mifflin, in his judgment, has set out the facts in detail. It is sufficient for me to set out generally the background of events, from the voting to the filing of this petition.

3 After the votes had been counted at each polling station, the Statement of the Poll was issued by each Deputy

Returning Officer, the results were totalled and a preliminary announcement of the result was made by the Returning Officer. The Deputy Returning Officers then made up their documents, appropriately sealed and so on, and sent them to the Returning Officer. He made what is described as the official addition, obtaining his figures from the Statements of the Poll (Form 48) issued by the Deputy Returning Officers. He did not, in fact he is not permitted to, see any of the ballots which remain in their sealed envelopes until they are ultimately and finally disposed of.

4 The result of this official addition was

Edward Maynard	1756
Trevor Bennett	1748

5 In the light of this narrow difference the petitioner, Trevor Bennett, predictably, sought a recount in accordance with section 80 of the Election Act. This recount was taken by Mr. Justice Puddester and after proceeding to check the results and count the ballots for twelve polling stations, it was found that the ballots for Polling Station No. 13 were not in the papers sent by the Deputy Returning Ogfficer to the Returning Officer. The proper Statement of the Poll with the total votes cast for the candidates, the rejected votes, the spoiled ballots, and the other required information, was properly completed and certified by the Deputy Returning Officer. The proceedings were halted at this stage of the recount, and the Judge instituted appropriate inquiries, and found that the ballots had been destroyed by the Deputy Returning Officer after she had completed the count and certified the Statement of the Poll. At this point I should state that there has been no suggestion of wilful wrongdoing on the part of the election officials in the destruction of these ballots; apparently it was felt that the ballots having been counted and scrutinised by the Deputy Returning Officer, the Poll Clerk and the agents of the two candidates, were no longer required.

6 The Judge then terminated the recount and in conformity with section 91 certified the result to the Returning Officer, in the words of the certificate, "... I was unable to complete the recount of the said votes because the votes cast at the said election in polling station 13 of the said District, having been previously destroyed by the deputy returning officer for the said polling station, were not available to be recounted."

7 On the receipt of this certificate the Returning Officer declined to endorse the Writ of Election with the result of the election of Edward Maynard, but did endorse it in the following words:

> I hereby certify that the member (or members) elected for the Electoral District of St. Barbe South in pursuance of the within Writ of Election having received the majority of votes lawfully cast is/are undecided.

8 The petitioner then sought a mandamus. The application was heard by Mr. Justice Puddester, and in my view properly, it was rejected, the learned Judge declining to grant such an order on the grounds that there was a remedy provided in the Act by a petition such as we are now deciding.

9 Thus it appears that the Court is asked by the petitioner to declare the election void, and by the respondent to confirm the election and to declare him, Edward Maynard, lawfully elected.

10 If the election is declared void then the Act provides the necessary authority for the Speaker to adopt all the proceedings necessary for the issuing of a writ for a new election.

11 If the respondent is declared elected then the certificate which we are required to make to the Speaker is all that is required to confirm his election.

12 The law provides the grounds on which an election can be, or more correctly, is to be declared void. These

grounds are discoverable either in the Act, or at common law. In a general way they relate and are referable solely, to matters which occur either before the casting of votes or during the actual balloting. The underlying reason for declaring an election void is that it has been established that some conduct on the part of candidates or their friends, or some improper conduct on the part of those entrusted with the conduct of the election, has prevented the ballot being concluded properly. I think it a new concept to hold that what happens after an election has been completed and after a poll has been declared to say that the declared wishes of a majority, no matter how small, of the voters must be set aside and the opponents to begin all over again. To take this position is as unfair as it is illogical. To go further, if the motive for seeking to avoid an election for these post-election irregularities is to prevent abuse, then to throw the whole election in a district open again is to breed corruption and dishonesty. I think that once the result of a vote has been ascertained, and that it has been established that the votes cast by the electors have properly been cast without any taint of corruption or intimidation, then the election must be accepted as the final declaration of the voters.

13 In my consideration of the arguments addressed to us by counsel, I have had much in mind what was said by Martin, B., in the *Warrington Case, Crozier v. Rylands* (1869), 19 L.T.R. 812, "I adhere to every word said by Willes, J., in the Lichfield case, when he said that before a judge upsets an election he ought to be satisfied beyond all manner of doubt that the election was thoroughly void. The return of a member is a serious matter, and I am clearly of opinion that in this case, instead of doing justice, I should be doing the grossest possible injustice if I were to set aside this election." I accept this dictum as being a clear directive to a judge embarking on the hearing of an election petition. With this as my starting point I have endeavoured to weigh carefully the manner in which this election was conducted, and those important subsequent events which led to the petition before us.

14 I think the law to be clear: if the election was carried out properly and in substantial manner in the spirit of the Act, and if the voters were able to express their choice clearly and decisively without any obstruction or hindrance an election should not be set aside because of some failure to observe the letter of the Act. This admits of only one qualification, and that is, that if the failure to observe the letter of the Act in the opinion of the election court could have altered the result of the election then it may be set aside. I would add to this that by the result, I mean the ultimate election of one or other of the candidates, and not the number of votes which one received more than another.

15 This proposition is nothing new. Statutory provisions of a similar nature have appeared in many election acts, in Britain, and in the Canadian Provinces. It has been part of our Newfoundland statute law for some time and is found in its most modern manifestation in section 108 of the Election Act, which declares:

> 108. - An election shall not be declared invalid by reason of
>
> (a) Any irregularity on the part of the returning officer, or any irregularity in any of the proceedings *preliminary to the poll*; (the italics are mine)
>
> (b) lack of qualification in any election officer;
>
> (c) lack of qualification in any person signing a nomination paper received by the returning officer under this Act;
>
> (d) a failure to hold a poll at any place appointed for holding a poll;
>
> (e) non-compliance with the provisions of this Act as to the taking of the poll or the counting of the votes or as to limitations of time;
>
> (f) failure to open or close a poll on the hour prescribed by this Act; or

(g) any mistake in the use of the forms contained in the Schedule,

if it is shown to the satisfaction of the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in this Act and that such irregularity, failure, non-compliance or mistake did not materially affect the result of the election.

16 That the proposition has received judicial approbation goes without saying. I would refer particularly to what was said by Mr. Justice O'Brien in the *Eastern Division of Clare Case* (1892), 4 O'M. and H. at 163 "I think that these mistakes, although undoubtedly large, fall within section 13 of 35 and 36 Vict., c. 33, and that the election ought not to be declared invalid in consequence of them. Section 13 provides that an election shall not be declared invalid, by reason of a mistake or non-compliance with the rules, if the election was conducted in accordance with the principles of the Act and if the non-compliance or mistake did not affect the 'result of the election.'"

17 The same view in a slightly expanded form was expressed by Mr. Justice Kennedy in the *Islington, West Division Case* (1901), 5 O'M. & H. 120, at 125, and in substance by Palles, C.B., in *In re Pembroke Election Petition*, [1908] 2 I.R. 158 (K.B.D.), at 449.

18 It is noteworthy that these cases all deal with irregularities either before or during the election; "preliminary to the poll" is the phrase used in the Act. Counsel have acknowledged that no cases have come to their attention dealing with matters occurring after the polling was complete and the votes counted. In my view, if an indulgent view is to be taken of events before the voting, then a fortiori, irregularities not affecting the result and taking place after the vote must be viewed in the same way.

19 This view I think accords with the general proposition of law which says that where the voters have had a free and unfettered opportunity to express their choice, then the Court should not interfere without being satisfied that there was in fact no true election. This I hold to be the settled law on this point from 1875, when we find it clearly stated by Brett, J., (in the judgment read by Lord Cobridge, C.J., but prepared by the former) in *Woodward v. Sarsons*, [1874-80] All E.R. Rep. 262, down to the judgments in this Court by Dunfield and Winter, JJ., in the Ferryland Election Petition (1952) (which does not seem to have been reported). The Woodward case is the leading case on the point and has been consistently followed, so that it would be a brave judge, though a rash one, who would seek to overturn it now. Certainly I have no such intention, and since it accords with my own view, I am glad, with great respect, to be guided by it.

20 There, there were some four questions raised for the consideration of the Court: (1) What is the true statement of the law under which an election can be avoided by the common law of Parliament; (2) was that case within the rules; (3) whether a breach of the Ballot Act (similar in many respects to our Election Act) be a ground for avoidance of the election; (4) the application of an affirmative answer to this case.

As to the first, we are of the opinion that the true statement is that an election is to be declared void by the common law applicable to Parliamentary elections, if it was so conducted that the tribunal, which is asked to avoid it, is satisfied as matter of fact, either that there was no real electing at all, or that the election was not really conducted under the subsisting election laws.

21 On the question of what effect a breach of the Ballot Act had on the validity of the election the judgment said:

If this proposition be closely examined, it will be found to be equivalent to this - that the non-observance of the rules or forms, which is to render the election invalid must be so great as to amount to a conducting of the election in a manner contrary to the principle of an election by ballot, and must be so great as to satisfy the tribunal that it did affect or might have affected the majority of voters, or in other words the result of the election. It therefore is, as has been said, an enactment *ex abundanti cautela*, declaring that to be the law applicable to elections under the Ballot Act, which would have been the law to be applied if the

section had not existed.

22 Having said so much it now remains only to consider whether on the admitted facts of this case the election should be set aside, and the way made open to ask the electors to consider, or maybe to reconsider, their choice of a member to represent them in the House of Assembly.

23 I have had little difficulty in arriving at the conclusion that this election was properly conducted and there are no grounds upon which it should be set aside and declared void. The electors freely made their choice known, they voted and their votes were counted in all the polling stations in the District, including Polling Station No. 13 at Sally Cove.

24 The only failure in the mechanics of this election was that a recount of the votes was not possible--some of the ballots were destroyed after they had been properly counted. It cannot be over-emphasized that the Act provides for the official counting to be done at the individual polling stations by the Deputy Returning Officers in the presence of the candidates, or their agents, and the result to be recorded and certified by the Deptuuty Returning Officer in a Statement of the Poll in Form 48.

25 The Act provides for a judicial recount, but where one is not sought then the result certified in Form 48 is the sole measure of the candidates' performance.

26 So with this case; there was no recount; not because one was not sought, but because it was a physical impossibility. Where there is no recount then the statement of the Poll is the announced result, and this must be so, unless the election be set aside. I have said there are no grounds to set aside the election, and it follows logically that I say that the results at this polling station No. 13 are those shown in Form 48. The Returning Officer for the District has made his official addition and has certified the Declaration of Election (Form 50) with the following result:

Edward Maynard	1756
Trevor Bennett	1748

27 This result must be endorsed on the Writ of Election and it is ordered that the Returning Officer comply with this direction of the Court.

28 The petition must be dismissed, the election of Edward Maynard is affirmed, and a certificate to this effect has been issued for the information of the House of Assembly.

29 The respondent is entitled to his costs.

***Mifflin, J.*:**

30 This matter arises out of the general election of members to serve in the House of Assembly held on October 28, 1971 (the October election) in accordance with The Election Act, 1954 (the Election Act), particularly in respect of the election of a member for the electoral district of St. Barbe South. The Act lays down, among a great many other things, the duties of the returning officers and deputy returning officers to be carried out while the poll is open and after it closes, including those dealing with the counting of the votes, the statement of the poll, the official addition of the votes and the declaration of candidates to serve as members in the House of Assembly. The Act provides for a judicial recount of the votes in any electoral district when requested. And it also provides for the trial of election petitions complaining of, among other things, no return and corrupt practices under the Act. The relevant sections are 74 (duties of deputy returning officers), 75 and 78 (duties of returning officers) 80, 82 and 91 (judicial recount) and 120, 121, 124, 133 and 135 (trial of election petitions). As a matter of convenience these sections and the forms I refer to later are set out in the schedule to this judgment.

31 This is not the only proceeding initiated as a result of the election in St. Barbe South. And I feel that a short resume of the events will be helpful in understanding the factual as well as the legal position.

32 At the official addition of the votes by the returning officer, Melvin Gilley, for St. Barbe South (sec. 75(2)) in the October election Edward Maynard received 1756 votes and Trevor Bennett, the other candidate, received 1748 votes, and Mr. Gilley (sec. 75(5)) thereupon issued a declaration in Form 50 of the Act declaring Mr. Maynard to have been elected as the member for St. Barbe South.

33 Based upon the allegation in Mr. Bennett's petition and the supporting affidavits that in counting the votes cast in St. Barbe South the deputy returning officer had improperly rejected ballot papers which should have been counted and counted ballot papers which should have been rejected, a Judge ordered a recount (sec. 80). Twelve polling stations were dealt with in the recount but when the documents for polling station thirteen were examined it was found that the envelopes which should have contained the ballot papers cast for the candidates did not contain them but merely the statement of the poll in Form 48 of the Act. (sec. 74(9) and (10)). The Judge stopped the recount and certified to the returning officer that he could not complete the recount because the votes cast in polling station thirteen were not available to be recounted. (sec. 91(1)). The position accepted by everyone at the recount was that the ballot papers had been destroyed by the deputy retruning officer instead of being placed in the appropriate envelopes after they had been counted and the statement of the poll made up. (Form 48).

34 When he had been notified that a recount had been ordered, Mr. Gilley delayed transmitting to the chief electoral officer the writ of election with his return as in Form 51 endorsed on it that the candidate entitled to be elected is duly declared to be elected (sec. 78(1)(b) and sec. 82). Nor did he make the return when he had received the Judge's certificate that the recount could not be completed, or when Mr. Maynard had made a formal demand upon him to do so by declaring Mr. Maynard as the elected member. But he did transmit the writ of election to the chief electoral officer with an endorsement on it that the member elected for St. Barbe South is "undecided." Then, in an endeavour to force the returning officer to make the return declaring him elected as the member, Mr. Maynard applied to the Supreme Court for an order that a writ of mandamus issue to the returning officer directing him to endorse on the writ of election that Mr. Maynard is the elected member to serve in the House of Assembly for St. Barbe South. Mr. Justice Puddester dismissed the application on the broad ground that mandamus could not be granted because the Act provided (secs. 120 and 121) by way of election petition for the very order he was asked to make, that is, compelling the returning officer to make a return where he has made no return of an elected member. Having come to this decision, the right decision in my view, Mr. Justice Puddester, quite properly, did not deal with the merits of Mr. Maynard's claim, that is, that he has the right to be declared to be the elected member for St. Barbe South, but merely pointed out that if he has that right sections 120 and 121 of the Act provide the correct method of enforcing it.

35 In the meantime, between the filing of the application for the writ of mandamus and the hearing of the application, Mr. Bennett had filed a petition in accordance with section 120 of the Act stating, among other things, that no election of a member had been made in respect of St. Barbe South and that no such return can be made, and praying "A determination" that the election in St. Barbe South "was void," and "Such further order as is just." Mr. Maynard has filed an answer to that petition claiming entitlement to an order from this Court compelling a return to be made that he is elected to serve in the House of Assembly as the representative of St. Barbe South. It is that petition and the answer to it that we are now asked to consider.

36 The petition is based simply on "no return." There is no suggestion of an undue return or undue election or a double return or of a corrupt or illegal practice; no suggestion of any wrongdoing before or during the holding of the poll or before or during the counting of the votes cast for the candidates or before the official addition of the votes by the returning officer from the statements of the poll prepared by the deputy returning officers and the issue of a declaration in Form 50 by the returning officer that Edward Maynard had received the larger number of votes and was therefore declared elected.

37 In polling station thirteen the deputy returning officer carried out her duties during the poll, and after the close of the poll so far as the counting of the votes is concerned in the presence of the candidates or their agents, and she made up the statement of the poll for polling station thirteen. Then, when all this was done, she merely omitted to put the ballot papers cast for each candidate in separate envelopes and send them in the sealed ballot box to the returning officer with the other election documents including the statement of the poll; the mistake was made after the votes were cast, after the poll was closed, and after the votes were counted. The election was conducted properly and the votes were properly counted and the official addition of the votes was properly made. When a recount was ordered the returning officer delayed making his return to the chief electoral officer declaring Mr. Maynard duly elected. It will be noted that he is to "delay" his return until he receives the Judge's certificate of the "result" of the recount and upon receipt of that certificate he "shall" make his return (sec. 82). The "result" of the recount in St. Barbe South is that the recount could not be completed because of a mistake after the votes were counted, not because of some irregularity before or during the poll and before the votes were taken from the ballot box and counted and reported to the returning officer and included in the statement of the poll. (sec. 74(1), (9) and (12)). If in such circumstances the recount cannot be completed because the actual ballot papers for a polling station are missing then, in my view, the returning officer must complete his duty under section 78(1)(b) and make a return. Such a case is not one in which the election should be declared void; the election was properly conducted up to and including the counting of the votes for each candidate and the preparing of the statement of the poll so far as polling station thirteen is concerned. And there is no suggestion that it was not so conducted so far as any other polling station in St. Barbe South is concerned.

38 Section 91 has no connection with section 78 except that in making the return under subsection (1) (b) of that section the returning officer must use the figures contained in the Judge's certificate if the recount is completed. If it cannot be completed because of a mistake made after the votes have been cast and counted then the returning officer must continue his duty and make his return from the official addition of votes as he would if no recount had been ordered. A recount "delays" the making of a return; it does not "prevent" the making of a return if one can be made. And one can be made if, as in St. Barbe South, the votes have been cast and counted in accordance with the Act but a recount cannot be completed because of an innocent mistake made, after the votes have been conducted, not by a candidate or his agent or anyone acting for him but by an election official appointed to have some part in the conduct of the election. To hold otherwise would do a grave injustice to Mr. Maynard; the mistake was not his; it was made after the votes were counted; there was no irregularity during the holding of the poll. And, not only would it do an injustice to Mr. Maynard but it would do an injustice to the voters of St. Barbe South because they would in effect be disfranchised in the election through no fault of any elector or of any candidate. Moreover, not to order a return to be made but to declare an election void under these circumstances would leave the door open to the possibilities of practices which would invalid any election.

39 Even assuming that Mr. Justice Puddester did not certify the result of the recount in this case, it would still have been open to either candidate to take a petition based on "no return" under section 120. And in such a case I would still have held that a return would have to be completed in accordance with section 78(1)(b).

40 In addition, the Act does not operate in a vacuum, that is, something has to be done in this case. And since this is not a case of an undue return or an undue election of a member or of a double return or of a corrupt or illegal practice or an unlawful act committed before or during the holding of the poll but one of an honest mistake made after the votes were counted, it is not a case for a declaration that the election was void. Therefore, a return should be compelled in respect of St. Barbe South, and unless such a return is made on the basis of the official addition of the votes that Mr. Maynard is the candidate elected to represent St. Barbe South in the House of Assembly the people of St. Barbe South will not be represented there and will have no voice in the conduct of the affairs of the Province. The people of St. Barbe South have voted and their votes have been counted in a valid election and in all justice they should now be represented in the House of Assembly.

41 I have read all of the cases cited by counsel and, in my view, they confirm the determination I have reached in this matter.

42 Section 143 of the Act reads:

> At the conclusion of the trial the Judges shall determine whether the candidate whose election or return is complained of or any or what other person was duly returned or elected, or whether the election was void, and shall forthwith certify in writing such determination to the Speaker, appending thereto a copy of the notes of the evidence.

43 At the moment the office of Speaker is vacant and the question arises as to whom the certificate of the Judges ought to be sent. Section 2(v) reads:

> 'Speaker' means the Speaker of the House of Assembly or when the office of Speaker is vacant or when the Speaker is absent from the province or is unable to act, the Clerk of the House of Assembly or any other officer for the time being performing the duties of Clerk;

44 Under the circumstances of this case the proper procedure to be followed is to send the certificate to the Clerk of the House of Assembly.

45 As no evidence was given at the trial obviously a copy of the evidence cannot be appended to the certificate. It is a fact that Mr. Noel did endeavour to introduce evidence of the situation at the time Puddester, J., stopped the recount but this was not allowed because it was irrelevant to this petition. The facts recited in this judgment were either agreed to in the pleadings or between counsel at the hearing. The references to the mandamus were taken from the judgment of Puddester, J., filed in that connection earlier.

46 Mr. Maynard is entitled to his costs against Mr. Bennett.

SCHEDULECOUNTING AND REPORTING THE VOTES.

47 74. (1) Immediately after the close of the poll, in the presence and in full view of the poll clerk and the candidates or their agents and of at least two electors if none of the candidates are represented, the deputy returning officer shall, in the following order

> (a) count the number of electors whose names appear in the poll book as having voted and make an entry thereof on the line immediately below the name of the elector who voted last, thus: "The number of electors who voted at this election in this polling station is (stating the number)", and sign his name thereto;
>
> (b) count the spoiled ballot papers, if any, place them in the special envelope supplied for that purpose and indicate thereon the number of the spoiled ballot papers and seal it;
>
> (c) count the unused ballot papers, place them with all the stubs of all used ballot papers in the special envelope supplied for that purpose and indicate thereon the number of unused ballot papers;
>
> (d) Check the number of ballot papers supplied by the returning officer against the number of spoiled ballot papers, if any, the number of unused ballot papers and the number of electors whose names appear in the poll book as having voted, in order to ascertain that all ballot papers are accounted for;
>
> (e) open the ballot box and empty its contents upon a table; and
>
> (f) count the number of votes cast for each candidate on one of the tally sheets supplied, giving full opportunity to those present to examine each ballot paper, and the poll clerk and at least two witnesses

shall each be supplied with a tally sheet upon which he may keep his own score as each vote is called out by the deputy returning officer. (Act No. 49 of 1955)

48 (2) In counting the votes the deputy returning officer shall reject all ballot papers

(a) which have not been supplied by him;

(b) which have not been marked for any candidate;

(c) on which votes have been cast for more candidates than are to be elected; or

(d) upon which there is any writing or mark by which the elector could be identified, but no ballot paper shall be rejected on account of any such writing, number or mark placed thereon by the deputy returning officer.

49 (3) If, in the course of counting the votes, any ballot paper is found with the counterfoil still attached thereto, the deputy returning officer shall, carefully concealing the number thereon from all persons present and without examining it himself, remove and destroy such counterfoil, and he shall not reject the ballot paper merely by reason of his former failure to remove the counterfoil, but nothing in this subsection contained, however, shall relieve the deputy returning officer from any penalty to which he may have become liable by reason of his failure to remove and destroy the counterfoil at the time of the casting of the vote to which it relates.

50 (4) If, in the course of counting the votes, the deputy returning officer discovers that he has omitted to affix his initials on the back of any ballot paper, as provided by subsection (1) of Section 64 he shall, in the presence of the poll clerk and the agents of the candidates affix his initials to such ballot paper, and shall count such ballot paper, as if it had been initialled by him in the first place, if he is satisfied that

(a) the ballot paper is one that has been supplied by him; and

(b) the omission has really been made, and that every ballot paper supplied to him by the returning officer has been accounted for, as provided by paragraph (d) of subsection (1).

51 (5) Nothing in subsection (4) shall relieve the deputy returning officer from any penalty to which he may have become liable by reason of his failure to affix his initials on the back of any ballot paper before handing it to an elector.

52 (6) The deputy returning officer shall keep a record on the special form printed in the poll book of every objection made by any candidate, or his agent or any elector present, to any ballot paper found in the ballot box and shall decide every question arising out of the objection and the decision of the deputy returning officer shall be final, subject to reversal, on a recount or on a petition questioning the election or return, and every objection shall be numbered, and a corresponding number shall be placed on the back of the ballot paper and the ballot paper shall be initialled by the deputy returning officer.

53 (7) All the ballot papers not rejected by the deputy returning officer shall be counted and a record kept of the number of votes cast for each candidate and of the number of rejected ballot papers, and in an electoral district entitled to return one member the ballot papers marked for each candidate shall be put in separate envelopes, and in an electoral district entitled to return more than one member the ballot papers marked for all candidates shall be put in a separate envelope, and the rejected ballot papers shall be put in a special envelope and all the envelopes shall be endorsed so as to indicate their contents, and shall be sealed with gummed paper seals by the deputy returning officer and the deputy returning officer and the poll clerk shall affix their signatures to such seals, and the agents or

witnesses present may, if they so desire, affix their signatures thereto. (Act No. 49 of 1955).

54 (8) The deputy returning officer and the poll clerk, immediately after the completion of the counting of the votes, shall each take and subscribe the oaths as in Forms No. 46 and 47 of the Schedule.

55 (9) The deputy returning officer shall make the necessary number of copies of the statement of the poll as in Form No. 48 of the Schedule, one copy to remain attached to the poll book, one copy to be retained by the deputy returning officer and one copy for the returning officer which shall be enclosed in a special envelope supplied for the purpose, and he shall seal the envelope and deposit it in the ballot box, and he shall also deliver one copy of such statement of the poll to each of the candidates' agents, and he shall mail one copy to each candidate in the special envelope provided for the purpose to his address as stated on the ballot papers.

56 (10) The deputy returning officer shall

> (a) place in the ballot box a large envelope supplied for the purpose, bearing the special gummed seal provided therefor initialled by the deputy returning officer, the poll clerk and the candidates or agents if any are present, containing the poll book in its own proper envelope supplied for the purpose, the ballot papers - unused, spoiled, rejected and counted for each candidate and the stubs of used ballot papers - each lot in its proper envelope supplied for the purpose and sealed in the manner prescribed by subsection (7), the supplementary list of electors filed under Section 65 in its proper envelope supplied for the purpose, all oaths taken under Section 66 together with all other oaths of electors taken at the poll and together with all other forms and documents used in the election and not specifically referred to in this subsection in a proper envelope supplied for the purpose, making sure that the documents referred to in subsection (11) are not enclosed in the large envelope referred to in this paragraph or in the envelopes referred to in paragraphs (b) and (c),
>
> (b) ascertain that there is in the ballot box the official statement of the poll prepared for the returning officer placed in its proper envelope as provided for by subsection (9) but not enclosed in any other envelope, and
>
> (c) place in the ballot box a large envelope supplied for the purpose, containing the official list of electors used at the poll, the copy or copies of The Election Act supplied by the returning officer and all other forms, material and supplies provided for use at the polling station and not specifically referred to in this paragraph or in paragraphs (a) and (b), and then the ballot box shall be sealed with one of the special metal seals supplied for the use of the deputy returning officer and transmitted immediately to the returning officer, and the returning officer may appoint one or more persons to collect the ballot boxes from a given number of polling stations and such a person shall, on delivering the ballot boxes to the returning officer, take and subscribe the oath as in Form No. 49 of the Schedule. (Act No. 29 of 1964).

57 (11) The deputy returning officer shall, with the ballot box, transmit or deliver to the returning officer, in the envelope provided for that purpose, a preliminary statement of the poll in the form prescribed by the chief electoral officer and the polling station account, having first caused such account to be filled in and signed by the officials of his polling station entitled to fees, and by the landlord thereof.

58 (12) Every deputy returning officer shall by telegraphic or telephonic communication forward to the returning officer of the electoral district where the deputy returning officer is acting

> (a) statements of the count from time to time during the counting of the votes as prescribed by the chief electoral officer where it is possible to do so and the chief electoral officer so directs; and
>
> (b) a preliminary statement of the poll as soon as available after the votes have been counted,

and the returning officer shall by any such method of communication and as soon as possible after they are received forward all such statements received by him to the chief electoral officer.

59 (13) The returning officer may direct that the ballot boxes shall be returned to him by parcel post, registered.

60 (14) If any deputy returning officer omits to enclose within the ballot box, and the proper envelopes provided for that purpose, any of the documents mentioned in this section, he shall, in addition to any other punishment to which he may be liable, forfeit all rights to payment for his services as such officer, and the returning officer shall not pass any claim for payment of the services of such deputy returning officer if it appears that the omission was made by reason of any want of good faith on the part of the deputy returning officer.

PROCEEDINGS AFTER RETURN OF BALLOT BOXES.

61 75. (1) The returning officer upon the receipt of each ballot box, shall take every precaution for its safe-keeping and for preventing any person other than himself and his election clerk from having access thereto and the returning officer shall examine the special metal seal affixed to each ballot box by the deputy returning officer, pursuant to subsection (10) of Section 74, and if it is not in good order, the returning officer shall affix his own special metal seal, and he shall record the condition of the special metal seal required to be affixed by the deputy returning officer to every ballot box in the appropriate column of his record book.

62 (2) After all the ballot boxes have been received, the returning officer, at the place, day and hour fixed in the Public Notice posted up in accordance with Section 38 for the official addition of the votes, and in the presence of the election clerk and of the candidates and their agents who are present, shall open the ballot boxes, and from the official statements of the poll therein contained, add together the number of votes given for each candidate,

63 (3) If, at the official addition of the votes, none of the candidates or his agents is present, it shall be the duty of the returning officer to secure the presence of at least two electors who shall remain in attendance until the official addition of the votes has been completed.

64 (4) If any ballot box does not appear to contain an official statement of the poll either loose or in its separate envelope as hereinbefore provided, the returning officer may, for the purpose of finding such statement of the poll, open, in the following order.

(a) the large envelope found in the ballot box and appearing to contain miscellaneous papers; and

(b) the envelope containing the poll book, and make a copy of the completed statement of the poll as signed in the poll book,

until he finds that statement, and if that is done, all the papers, other than the official statement of the poll, if found, shall be placed by the returning officer in a special large envelope which shall be sealed and endorsed by him, but this subsection shall not authorize the opening of any envelopes appearing to contain only ballot papers marked for the candidates, and in the absence of other information, the endorsement on such envelopes may be adopted as indication the result of the poll at the polling station in question. (Act No. 22 of 1960)

65 (4A) After the returning officer has removed the official statement of the poll from each ballot box or the procedure has been followed as provided by this section for any ballot box from which the official statement is missing, the returning officer shall seal each box, from which only the official statement, if any, is taken, with a special metal seal supplied to him for that purpose. (Act No. 29 of 1964).

66 (5) (a) On the official addition of the votes in an electoral district returning one member to the House of Assembly the candidate who receives the largest number of votes shall be declared elected, and in an electoral

district returning two members the two candidates who receive the largest and next largest number of votes respectively shall be declared elected.

67 (b) the declaration mentioned in paragraph (a) shall be in writing as in Form No. 50 of the Schedule and a copy thereof shall be delivered immediately to each candidate or his agent if either of them is present at the official addition of votes, or if any candidate is not present or is not represented at the official addition of the votes the declaration shall be sent to the candidate immediately by registered mail.

68 (6) Whenever, on the official addition of the votes, an equality of votes is found to exist between any two or more candidates and an additional vote would entitle one of the candidates to be declared elected, the returning officer shall cast the additional vote.

ELECTION RETURN.

69 78. (1) The returning officer, immediately after the twelfth day next following the date upon which he has completed the official addition of the votes, unless before that time he has received notice that he is required to attend before a judge for the purpose of a recount, and where there has been a recount, then immediately thereafter, shall transmit in the manner directed by the chief electoral officer or by registered mail to the chief electoral officer

(a) a copy of the declaration of election completed as in Form No. 50 of the Schedule and referred to in subsection (5) of Section 75;

(b) the writ of election, with his return as in Form No. 51 of the Schedule endorsed thereon that the candidate or candidates entitled to be elected are duly declared to be elected;

(c) a report of his proceedings in the form prescribed by the chief electoral officer;

(d) recapitulation sheets, in the form prescribed by the chief electoral officer, showing the number of votes cast for each candidate at each polling station, and containing any observations the returning officer thinks proper respecting the state of the election papers received from his deputy returning officers;

(e) the official statements of the poll as in Form No. 48 of the Schedule, from which the official addition of the votes was made;

(f) the nomination papers of each candidate together with the affidavits of attestation of the nomination papers,

and the returning officer shall also transmit all the documents sealed in the ballot boxes as provided for by subsection (4A) of Section 75, including the supplementary lists of electors and the ballot papers - unused, spoiled, rejected and counted for each candidate - and the stubs of used ballot papers, still intact in the sealed ballot boxes, together with all other ballot boxes in his custody to and in the manner directed by the chief electoral officer. (Act No. 29 of 1964).

70 (2) The chief electoral officer shall, on receiving the return of any member elected to serve in the House of Assembly, enter it in the order in which the return is received by him in a book to be kept by him for the purpose and thereupon immediately give notice in an ordinary or special edition of The Newfoundland Gazette of the name of the candidate so elected and in the order in which it was received, and shall also forward to the Deputy Minister of finance a certified statement of the number of votes cast for each candidate in every electoral district, and when the Deputy Minister has satisfied himself that a candidate is under this Act entitled to the return of his deposit, he shall return it accordingly.

2 Nfld. & P.E.I.R. 543

71 (3) The chief electoral officer shall, immediately after each election, cause to be published a report giving, by electoral districts, the number of votes cast for each candidate, the number of rejected ballot papers, the number of names on the lists of electors, together with any other information that he may deem fit to include.

RECOUNT

72 80. If within ten days after that on which the returning officer has made the addition of the votes for the purpose of declaring any candidate elected, upon the application of a candidate or a voter, it is made to appear by affidavit to a Judge that a deputy returning officer has in counting the votes,

(a) improperly counted any ballot paper;

(b) improperly rejected any ballot paper; or

(c) made an incorrect statement of the number of ballots cast for any candidate,

or that the returning officer has improperly added up the votes, and if the applicant deposits within that time with the Registrar of the Supreme Court the sum of one hundred dollars in legal tender as security for the costs in connection with the recount or final addition, the Judge may appoint a time and place to recount or finally to add up the votes cast at the election.

73 32. The returning officer after the receipt of the notice shall delay making his return to the chief electoral officer until he receives a certificate from the Judge of the result of the recount or final addition, and upon receipt of the certificate shall make his return.

74 91. (1) The Judge shall within two days after the recount or final addition certify the result to the returning officer who shall then immediately declare to be elected the candidate having the greatest number of votes.

75 (2) In case of an equality of votes, the returning officer shall give the casting vote.

TRIAL OF CONTROVERTED ELECTIONS.

76 120. (1) A petition complaining of an undue return or undue election of a member, or of no return or double return, or of any unlawful act committed by any candidate not returned by which the candidate is alleged to have become disqualified to sit in the House of Assembly may be presented to the Supreme Court by

(a) any person who had the right to vote at the election to which the petition relates;

(b) any person who voted at the election;

(c) a candidate at the election.

77 (2) The production of the official list of electors containing the names of the petitioner as set forth in the petition, or a copy certified by the Minister to be a true copy of the official list used at the election in the electoral district to which the petition relates shall be conclusive evidence that the petitioner could lawfully present the petition, and, if the petitioner was a candidate at such election, or if there is no list available, an affidavit by the petitioner that he was a candidate or an elector at the election, as the case may be, shall be conclusive evidence that the petitioner could lawfully present the petition.

78 121. Whenever a petition is presented under this Act complaining of no return, such order may be made

thereon by the Court as is deemed expedient for compelling a return to be made, or the Court may allow the petition to be tried in the manner herein provided with respect to ordinary election petitions.

79 124. The petition presented under Section 120 need not be in any particular form, but it must complain of the undue return or undue election of a member or that no return has been made or that a double return has been made or of matter contained in a special return made or of some unlawful act committed by a candidate not returned by which the candidate is alleged to have become disqualified to sit in the House of Assembly, and it must be signed by the petitioner, or by all of the petitioners if there are more than one.

80 133. Within five days after the decision upon the preliminary objection or on the expiration of the time for presenting the preliminary objection if none be presented the respondent may file a written answer to the petition and serve a copy thereof upon the petitioner, but whether or not such answer is filed, the petition shall be held to be at issue after the expiration of the time for filing it, and the Court may, at any time thereafter, upon the application of either party, fix some convenient time for the trial of the petition.

81 135. (1) Every election petition shall be tried by two Judges without a jury.

82 (2) The trial of an election petition shall take place at St. John's: Provided that, if it appears to the court that special circumstances exist which make it desirable that the petition should be tried elsewhere, the Court may appoint another place for the trial.

Form No. 48STATEMENT OF THE POLL

(Section 74)

83

Electoral District of Polling Station No.

Number of ballot papers
received from returning
officer . . . . . .

Number of ballot papers
cast for . . . . . .

" " " " "
. . . . . .

" " " " "
. . . . . .

" " " " "
. . . . . .

" " " " "
. . . . . .

Number of *rejected ballot papers. .

(*A rejected ballot paper means a

ballot paper which has been handed by the deputy returning officer to an elector to cast his vote but which, at the close of the poll, has been found in the ballot box unmarked or so improperly marked that it cannot be counted)
Total number of ballot papers found in ballot box . . . . . .

Number of unused ballot papers . . . . . .

Number of **spoiled ballot papers . . . . . .

(**A spoiled ballot paper means a ballot paper which, on polling day, has not been deposited in the ballot box but has been found by the deputy returning officer to be soiled or improperly printed, or which has been handed by the deputy returning officer to an elector to cast his vote, and (a) has been spoiled in the marking by the elector, and (b) has been handed back to the deputy returning officer and exchanged for another) _____ _____

TOTAL

_____ _____

Number of names on official list of electors used at the poll . . . . . .

Number of names on supplementary list of electors taken at the poll . . . . . .

I hereby certify that the above statement is correct

84 Dated at ..... this ..... day of ....., 19 .....

.....

Deputy Returning Officer.

2 Nfld. & P.E.I.R. 543

Form No. 50

DECLARATION OF ELECTION

(Section 75)

85 I, ..., Returning Officer, for the electoral district of ..... hereby declare that at the election held in this electoral district on the ..... day of ....., 19 ..... the following candidate(s)

86 ..... (insert name, address and occupation)

87 ..... (insert name, address and occupation)

88 ..... (insert name, address and occupation) has (have) been elected as member(s) to serve in the House of Assembly for the electoral district of

89 Dated at ....., this day of ....., 19 .....

. . . . . .

Returning Officer.

Form No. 51RETURN TO THE WRIT AFTER A POLL HAS BEEN TAKEN.

(Section 78)

90 I hereby certify that the member (or members) elected for the electoral district of ..... in pursuance of the within writ of election having received the majority of votes lawfully cast is (are) (insert name, address, and occupation of member or members elected, as stated in the heading of the nomination paper).

91 Dated at ..... the ..... day of ....., 19 .....

. . . . . .

Returning Officer.

END OF DOCUMENT

2000 CarswellSask 141
2000 SKQB 81, 190 Sask. R. 235, [2000] S.J. No. 119

Reaburn v. **Lorje**

Dennis **Reaburn,** Petitioner and Pat **Lorje,** Respondent

Saskatchewan Court of Queen's Bench

Hunter J.

Judgment: February 25, 2000
Docket: Regina Q.B.G. 398/00

Counsel: J.F. Rybchuk, for Dennis Reaburn.
G.G. Walen, for Pat Lorje.

Subject: Public

Elections --- Practice and procedure on controverted elections -- In federal and provincial elections -- Petitions -- Sufficiency of petition

Candidate won election, defeating petitioner and other candidate -- Recount was held pursuant to Elections Act -- Recount judge declared election null and void because of number of irregularities which, individually, did not prejudice parties nor affect outcome but, cumulatively, affected result of election by their magnitude -- Candidate successfully appealed decision on grounds recount judge lacked jurisdiction to declare election null and void -- Petitioner brought petition pursuant to Controverted Elections Act to set aside election -- Candidate brought application to have petition set aside for failure to disclose sufficient grounds to have election set aside -- Application granted -- Irregularities did not affect election outcome -- Failure to use envelopes correctly was administrative error which did not prejudice parties, so affected ballots were counted -- Ballots not initialled by deputy returning officer and those lacking certification were not counted -- Although number of affected ballots exceeded original margin of victory, adjusted recount resulted in one vote margin in favour of candidate -- Petition did not allege sufficient grounds to set aside election -- Controverted Elections Act, R.S.S. 1978, c. C-32, section 11 -- Election Act, 1996, S.S. 1996, c. E-6.01.

Cases considered by Hunter J.:

Abrahamson v. Smishek (1964), 50 W.W.R. 664, 48 D.L.R. (2d) 725 (Sask. C.A.) -- applied

Davis v. Barlow (1910), 15 W.L.R. 49, 20 Man. R. 158 (Man. K.B.) -- considered

Gross v. Wiebe, [1976] 5 W.W.R. 394 (Sask. C.A.) -- applied

Karwacki v. Lorje, 1999 SKQB 179 (Sask. Q.B.) -- considered

Karwacki v. Lorje (1999), [2000] 3 W.W.R. 199 (Sask. C.A.) -- considered

Lamb v. McLeod (No. 1) (1931), [1932] 1 W.W.R. 206 (Sask. C.A.) -- applied

Storey v. Zazelenchuk (1982), 21 Sask. R. 158, 5 C.R.R. 99 (Sask. Q.B.) -- considered

Statutes considered:

Controverted Elections Act, R.S.M. 1902, c. 34

Generally -- referred to

Controverted Elections Act, R.S.S. 1953, c. 5

s. 10(d) -- considered

Controverted Elections Act, 1971, S.S. 1971, c. 5

Generally -- referred to

s. 11 -- referred to

s. 11(d) -- referred to

Controverted Elections Act, R.S.S. 1978, c. C-32

Generally -- pursuant to

s. 3 -- considered

s. 4(c) -- considered

s. 4(d) -- considered

s. 11(d) -- referred to

s. 16 et seq. -- referred to

s. 37 -- considered

Election Act, R.S.S. 1953, c. 4

Generally -- referred to

s. 145 -- considered

Election Act, 1996, S.S. 1996, c. E-6.01

Generally -- considered

s. Pt. VI -- referred to

s. 73(2) -- referred to

s. 89(2) -- referred to

s. 141(20)(a) -- referred to

s. 141(21) -- referred to

s. 160 -- considered

s. 164 -- considered

ss. 166-169 -- referred to

s. 168 -- considered

s. 168(4) -- considered

s. 168(5) -- considered

s. 168(7) -- considered

s. 170 -- considered

s. 170(b) -- considered

s. 175 -- considered

s. 175(a) -- considered

s. 207(1)(a) -- considered

s. 207(1)(b) -- considered

Rules considered:

Queen's Bench Rules

R. 173 -- referred to

APPLICATION by candidate to set aside petition to set aside election.

***Hunter J.*:**

1 Pursuant to *The Controverted Elections Act*, R.S.S. 1978, c. C-32 ("the CEA"), the petitioner, Dennis Reaburn ("Reaburn"), petitions this court against the undue return or undue election of the respondent, Pat Lorje ("Lorje"), in the constituency of Saskatoon South East following the election held on September 16, 1999. Reaburn was a defeated candidate in the constituency.

2 The CEA governs the procedures to challenge the validity of the election. Pursuant to s. 3 of the CEA

> ...[A]ny defeated candidate ... of the constituency in which the election was held may petition the court against the undue return or undue election of a candidate at the election in that constituency.

The petition shall contain (CEA, s. 4(c) and (d)):

> 4. (c) a statement complaining of the undue return or undue election of the candidate;
>
> (d) a statement in summary form of the material facts and grounds relied on to sanction the prayer, together with such particulars as may be necessary to prevent surprise or unnecessary expense to the respondent and to ensure a fair and effectual trial

3 The respondent may apply to a judge to set the petition aside on the grounds enumerated in the CEA s. 11. Lorje has brought this application to set aside the petition on the basis of ground:

> 11. (d) that the petition does not on its face disclose sufficient grounds or facts to have the election set aside and declared void.

4 The petitioner is not required to set out in the petition the evidence relied on. If it is just a matter of particulars being required, that may be resolved on an application to the court. If the

petition is not ordered to be set aside, the petition is at issue and a trial of the petition may be ordered (see s. 16 et seq.).

5 The issue before me is whether the petition on its face discloses sufficient facts or grounds to have the election set aside.

6 The circumstances leading to this application under s. 11(d) follows.

7 After the counting of ballots cast in the September 16, 1999, election in Saskatchewan South East constituency, Lorje was declared a winner by a margin of 36 votes. Because the rejected ballots, spoiled ballot papers, declined ballot papers and unopened ballot papers exceeded the margin of victory, the losing candidates were entitled to a judicial recount pursuant to *The Election Act, 1996*, S.S. 1996, c. E-6.01 ("the EA").

8 The recount judge excluded 66 ballots and then stated that subject to "the admissibility or otherwise of the ballots counted" at the recount, Lorje had a margin of victory of 38 votes (3172 votes) over the closest candidate Karwacki (3134) votes.

9 The recount judge then listed a number of issues which arose during the recount, which required determination by him. The summary of irregularities and/or non-compliance with the EA which he discovered in the course of his recount were stated at para. 39 of his recount judgment (*Karwacki v. Lorje* , 1999 SKQB 179 (Sask. Q.B.) as follows:

> ¶39 Where such irregularity and/or non-compliance prejudices a party involved, but does not affect the result of the election, the ballots should not be counted...
>
> **Summary of Irregularities and/or Non-Compliances Found by Me**
>
> 1. In Poll Numbers 4, 22, 24, 26, 30, 32, 43, 44 and the Advance Poll, the large brown envelopes supplied for the purpose of holding, inter alia, the smaller white envelopes were not signed by the deputy returning officer as required by s. 141(21) of the Act;
>
> 2. In Poll Number 20, 6 ballots did not bear the initials of the deputy returning officer as required by s. 73(2) of the Act;
>
> 3. In Poll Number 40, 2 ballots did not bear the initials of the deputy returning officer as required by s. 73(2) of the Act;
>
> 4. In Poll Number 24, and the Advance Poll, the small white envelopes containing the ballots cast for the individual candidates, were not contained in the large brown envelope provided for the purpose as required by s. 141(20)(a) of the Act;
>
> 5. In Poll Number 44, the majority of the ballots did not bear the initials of the deputy returning officer as required by s. 73(2) of the Act but bore the initials of an unknown person;
>
> 6. In the Advance Poll I found that the small white envelopes which were supposed to contain the ballots cast for the individual candidates as required by s. 141(20)(a) of the Act, contained, rather, a combination of ballots cast for each candidate; and
>
> 7. In the Absentee Poll, the returning officer separated the certificates and ballots prior to their inspection by the representatives of the individual candidates as required by s. 89(2) of the Act.
>
> ¶40 Each of these irregularities are, in and of themselves, mere irregularities. In and of themselves they do not appear to affect the result of the election. As such, if only a few of these irregularities had occurred, they would be insufficient to void the election pursuant to s. 175 of the Act. In addition, if only a few of the non-compliances existed they could simply be

waived pursuant to s. 170(b) of the Act as indeed occurred with the first non-compliances as they did not, at the time, appear to prejudice any of the parties involved.

10 After hearing submissions from each of the parties involved and receiving briefs on these issues, the recount judge concluded as follows at para. 55 of his judgment:

> **Firstly**
>
> The irregularities, and/or non-compliances, numbered 1, 4 and 6 summarized above and found by me are, in and of themselves, minor and of the nature and kind contemplated by s. 175 of the Act and should not, ordinarily, be grounds for declaring the election null and void, nor do they, in and of themselves, prejudice any of the parties so as not to count these ballots within the meaning of s. 170(b) of the Act;
>
> **Secondly**
>
> The ballots not initialed in Poll Numbers 20 and 40, summarized by me as numbers 2 and 3 supra, should not be counted due to non-compliance with s. 73(2) of the Act. There is no indicia of reliability and fairness where there are not the required initials;
>
> **Thirdly**
>
> In Poll Number 44, summarized by me as number 5, supra, the ballots not initialed by the deputy returning officer should not be counted for the reasons already mentioned;
>
> **Fourthly**
>
> The ballots in the Absentee Poll, summarized by me as number 7 supra, should not be counted due to lack of compliance with s. 89(2) of the Act. There were valid grounds for objecting to several of the certificates. As there was no way of determining which ballots belonged to which certificates, all of these ballots should not be counted due to their lack of reliability and fairness;
>
> **Finally**
>
> It is clear that there were an inordinate number of irregularities, and/or non- compliances, which occurred in this election. While each of these irregularities, and/or non-compliances, can be sorted out individually, as can be seen from the above, it is equally clear that these irregularities and/or non-compliances as a whole do, and have in my view, affected the result of the election. There were, in my view, just too many irregularities and/or non-compliances to be merely dismissed as such. The sheer magnitude of them, as more particularly itemized by me supra, do, in the end, affect the result of the election.

11 The recount judge did not apply his conclusions to the vote count and adjust the vote accordingly. Instead, the recount judge held that the magnitude of irregularities and non-compliances with the EA cumulatively affected the election results and he declared the election to be null and void and set it aside on the basis that the recount judge has the inherent jurisdiction to declare the election to be null and void and set it aside.

12 Pursuant to the EA s. 168, any party to a recount may appeal the decision of a recount judge to the Court of Appeal. Unless the appeal is limited to specific findings made by the recount judge then the appeal is deemed to be a request for a recount of all the ballots (see ss. 168(4) and (5)). If the appeal is limited, then any candidate may file a cross appeal (see s. 168(7)).

13 An appeal was taken from this decision and the matter came before Tallis J.A. The sole question on the appeal was whether the recount judge had the statutory authority to declare the election null and void. There was no cross-appeal by either of the respondents. There was no appeal of the actual vote count, so no recount of the ballots was done.

14 Tallis J.A. allowed the appeal. He held that a judge performing a recount pursuant to the EA does not have the statutory authority to declare an election null and void. The recount judge is restricted to counting the ballots (see the EA ss. 160 and 164 and Tallis J.A. at para. 30 in *Karwacki v. Lorje*, [2000] 3 W.W.R. 199 (Sask. C.A.).

15 In distinguishing between the proceedings under the CEA, and the EA Tallis J.A. at para. 36 quoted with approval from the text Boyer: *Election Law in Canada*, Vol. II (Toronto: Butterworths, 1987) at pp. 1053, 1054 and 1057:

> ...At this recount, which can be initiated if the vote between candidates is close, any proper counting or the rejection of certain spoiled ballots is resolved by a judge...
>
> Controverted elections, the third process, in comparison with judicial recounts, occur less frequently, and involve much more serious disputes. Rather than dealing with such relatively technical matters as whether the ballots were in fact properly tallied up, controverted election proceedings challenge the results on a more fundamental level by questioning whether corrupt practices and other irregularities occurred in the election which could unseat the elected candidate even though he may have received the most votes...
>
> The controverted elections statutes afford the only way in which, by a judicial proceeding, the validity of an election can be inquired into.

16 Tallis J.A. held that s. 175 of the EA does not enlarge the powers of a judge conducting a recount nor does it apply at the recount stage. He then concluded as follows:

> ¶40 In my opinion, s. 175 refers to "the opinion of the court" in the context of proceedings under *The Controverted Elections Act* and not to a "judge" conducting a recount... A judicial recount is not the functional equivalent of a petition under *The Controverted Elections Act*. There is no basis to support such a conclusion under the terms of the Act itself.
>
> ¶41 For these reasons, I allow the within appeal and set aside the order declaring the election to be null and void. Since this is the only issue on appeal, the numerical findings on the recount stand as amended in the addendum of November 15, 1999.
>
> ¶42 Pursuant to s. 169(7), I certify that the appeal is allowed and the Order declaring the election held in the constituency of Saskatoon Southeast to be null and void is set aside... Since that Order is now set aside, the provisions of s. 169(8) require that "[t]he judge appealed from shall comply with the decision and shall certify the result without delay to the returning officer".

17 Following this direction, the recount judge certified that the votes cast for Lorje are 3172 for a margin of victory in favour of Lorje of 38 votes. From the decision of the recount judge it would appear that the total rejected ballots numbered 66 and the total ballot count was 8359.

18 Lorje submits that the grounds stated in the petition are identical to those irregularities and non-compliances with the EA noted by the recount judge. The grounds and facts stated in the petition paragraph 10 are:

> 10. The Petitioner says that the Respondent was unduly returned and/or unduly elected for the following reasons:
>
> (a) The gross and inordinate number of irregularities and/or non-compliances with the mandatory provisions of *The Election Act* that occurred by election officials during the voting process on September 16, 1999, including, in particular:
>
> (i) In Poll Numbers 4, 22, 24, 26, 30, 32, 43, 44 and the Advance Poll, the large brown envelopes supplied for the purpose of holding, *inter alia*, the smaller white envelopes

were not signed by the Deputy Returning Officer in contravention of Section 141(21) of *The Election Act*;

(ii) In Poll Number 20, 6 ballots did not bear the initials of the Deputy Returning Officer in contravention of Sections 73(2) and 207(1)(a) of *The Election Act*;

(iii) In Poll Number 40, 2 ballots did not bear the initials of the Deputy Returning Officer in contravention of Sections 73(2) and 207(1)(a) of *The Election Act*;

(iv) In Poll Number 24 and the Advance Poll, the small white envelopes each containing the ballots cast for the individual candidates, were not contained in the large brown envelope provided for that purpose in contravention of Section 141(20)(a) of *The Election Act*;

(v) In Poll Number 44, the majority of the ballots did not bear the initials of the Deputy Returning Officer but instead, bore the initials of some unknown person in contravention of Sections 73(2) and 207(1)(a) of *The Election Act*;

(vi) In the Advance Poll, the small white envelopes which were each supposed to contain the ballots cast for the individual candidates as mandated by Section 141(20)(a) of *The Election Act*, contained, rather, a mixed combination of ballots cast for all the candidates in contravention of Section 141(20)(a);

(vii) In the Absentee Poll, the Returning Officer separated the certificates from the ballots prior to their inspection by the representatives of the individual candidates such that they had no way of ensuring their validity or authenticity in contravention of Section 89(2) of *The Election Act*;

(b) The above-mentioned irregularities and/or non-compliances provide "no *indicia* of reliability and fairness" that the election was not carried out "fraudulently" (see paragraphs 12, 20 & 55 of the decision of Mr. Justice Grotsky);

(c) The above-mentioned irregularities and/or non-compliances adversely affected a total of 2,479 votes cast at the September 16, 1999, election.

(d) In total, 103 ballots were cast and counted which did not contain the initials of the Deputy Returning Officer as required by Sections 73(2) and 207(1)(a) of *The Elections Act*;

(e) Section 207(1)(a) - No deputy returning officer to neglect duties - falls under Part VI - Election Offences and Corrupt Practices - of *The Election Act* and provides that "no deputy returning officer shall knowingly omit to put his or her initials on the back of a ballot paper in use for the purposes of an election."

(f) The Respondent's margin of victory is uncertain or unknown. On election night, the Respondent was declared elected by a margin of 36 votes. On judicial recount, Mr. Justice Grotsky rejected and declined to count 129 votes leaving a reduced margin of victory of 9 votes. After appeal, the rejected and declined ballots were counted by Mr. Justice Grotsky and the margin increased to 38.

(g) This was the first general election held under the new provisions of *The Election Act, 1996*, c. E-6.01. As a matter of public policy the Courts should help ensure the electoral process is followed, not flawed. It would set a dangerous precedent to condone irregularities and/or non-compliances of this type and volume and thereby allow them to continue indefinitely into the future.

(h) The number or irregularities and/or non-compliances is far greater than the margin of victory of the Respondent, be it 9 or 38 votes, such that no candidate can reasonably and

validly be declared elected. The inordinate numbers of irregularities and non-compliances have materially and adversely affected the results of the election held in the constituency of Saskatoon South East on September 16, 1999.

19 Lorje submits that the vote count majority certified in her favour cannot be interfered with. There was no appeal nor cross appeal with respect to the vote count. The only count of votes performed by the recount judge resulted in a 38 vote margin of victory in favour of Lorje. Tallis J.A. directed the recount judge to enter the vote count when he said "The numerical findings on the recount stand as amended in the addendum of November 15, 1999". The facts and grounds stated in paragraph 10 of the petition are those raised by the recount judge. Any matters with respect to the vote count may not be overturned other than in accordance with ss.166 to 169 of the EA. The appeal and recount procedures are completed under the EA. Because of this and coupled with the express limitation in the CEA s. 37, the 38 vote margin is conclusive. The CEA, s. 37 provides:

> **37** Nothing in this Act shall be construed to authorize the judge to count or recount the ballots cast at an election; but the count of such ballots and the recount, if any, under *The Election Act*, shall be considered conclusive.

There was no appeal of this vote count.

20 The Petitioner agrees that the test for setting aside the petition is similar to the test for striking out a statement of claim and that it is only in plain and obvious cases where the court is satisfied beyond doubt that the is no triable claim that the petition should be dismissed. The petitioner alleges that all that need be shown by the allegations in the petition is that the petitioner has some chance of success. Reaburn submits that the court should be reluctant to strike a petition because that is the only recourse available to litigate the validity of an election on the merits.

21 With respect to proceedings under the CEA, a judge on any application or trial of the petition to controvert must be constrained by ss. 170 and 175 of the EA:

> **170** With respect to a recount or an addition and any proceeding or appeal relating to a recount or an addition:
>
> (a) no proceeding taken pursuant to this Act is invalid for informality, if there has been substantial compliance with the requirements of this Act; and
>
> (b) the judge hearing any application or making the recount or addition, or the judge of the Court of Appeal hearing any application or hearing an appeal, may waive compliance with any requirement of this Act if that judge is satisfied that the waiver is not prejudicial to any party to the proceedings.
>
> . . . . .
>
> **175** No election is to be declared invalid by reason of any of the following irregularities if, in the opinion of the court, the irregularity did not affect the result of the election:
>
> (a) any irregularity on the part of the returning officer or in any of the proceedings preliminary to the voting;
>
> (b) a failure to conduct voting at any polling place established for the purpose;
>
> (c) non-compliance with the provisions of this Act as to the taking of or the counting of the votes or as to limitations of time;
>
> (d) any mistake in the use of the forms prescribed by this Act;
>
> (e) the failure to serve the Chief Electoral Officer with any document; or

(f) the failure to include the poll number on any voter's declaration.

22 In his decision, Tallis J.A. emphasized the need for a judge to be bound by the strict provisions of the legislation given the public nature of these Acts and the court is assigned the duty to act as a compromise between conflicting parties in the legislature. The judge should not strain the law. The judge is limited to the jurisdiction conferred by the legislation. In particular, Tallis J.A. quoted from *Davis v. Barlow* (1910), 15 W.L.R. 49 (Man. K.B.) @ 51 (see Tallis J.A. @ para. 28) with respect to the position of a judge acting under the CEA:

> ...By the Controverted Elections Act power was delegated to Courts thereby constituted to deal with disputed elections in the manner therein specified. General jurisdiction over the return of members was not by these Acts conferred upon the Courts. No case has been cited to me, and I have found none, in which the Court has assumed directly to interfere with the return of a member of the legislature otherwise than under the Controverted Elections Act. In my opinion, the jurisdiction to do so is confined to the Courts established by those Acts...

23 Perhaps it is best summarized by Estey J. in *Storey v. Zazelenchuk* (1982), 21 Sask. R. 158 (Sask. Q.B.) at 162 where he stated:

> The position of courts in this province in election matters is that the approach must be one of care and caution and the exercising only of that authority which is clearly set out in the statute...

24 Counsel for both Reaburn and Lorje agree that the application pursuant to CEA s. 11(d) is akin to an application pursuant to the Queen's Bench Rules of Court, Rule 173, to strike a pleading. They agreed that on this application the court is restricted to examining the petition and the grounds alleged therein together with any documents incorporated by reference in the petition, and the court should assume the allegations to be true. Therefore, counsel agreed that the decisions of the recount judge and the Court of Appeal recount judge become part of this application.

25 Two court decisions with respect to applications made under legislation almost identical to CEA s. 11(d) are noteworthy. In *Gross v. Wiebe*, [1976] 5 W.W.R. 394 (Sask. C.A.), there was an appeal from the decision of the chamber judge to dismiss the application made pursuant to s. 11(d) of the CEA. Two grounds contained in the petition depended on the existence of a fact on a specific date. Because proof of the fact on that date did not under the law establish disqualification, then absent an amendment to the petition, the petition must be set aside. The Court of Appeal held that any amendment to the date was an amendment of substance; and no amendment to a petition is allowed which alleged new grounds or facts after the time for bringing the petition had lapsed.

26 In *Gross*, the Court of Appeal stated that in any matters arising in respect of petitions under the CEA, the court is to be guided by the views expressed in *Lamb v. McLeod (No. 1)*, [1932] 1 W.W.R. 206 (Sask. C.A.) at p. 208

> In acting in cases of election petitions, the Court is not exercising its ordinary civil or criminal jurisdiction. The Assembly is the guardian of its own prerogatives and privileges, and the Courts have nothing to do with questions affecting its membership except in so far as they have been specially designated by law to act in such matters: *Re Prince Albert Provincial Election; Strachan v. Lamont* (1906), 3 W.L.R. 571, affirmed 4 W.L.R. 411 (N.W.T. C.A.). Therefore, the Courts will always approach questions concerning their jurisdiction over election contests with great caution, as being unwilling to interfere without undoubted authority.

27 With respect to the applications to set aside the petition pursuant to the CEA s. 11 the duty of judges is stated at p. 399:

> When a summary application is made to set aside a petition under s. 11, the judge may do only one of two things. If he is satisfied the petition does not on its face disclose sufficient grounds and facts to have the election set aside, he will order that the petition be set aside. If not so satisfied, he will dismiss the application. When, as here, the petition does not on its

> face disclose sufficient grounds to have the election set aside, he should have set aside the petition; he had no authority to permit amendments that would overcome the deficiency.

Accordingly, the Court of Appeal held that the petition did not on its face disclose sufficient grounds and facts to have the election set aside. The petition was set aside.

28 In *Abrahamson v. Smishek* (1964), 50 W.W.R. 664 (Sask. C.A.), the sufficiency of the petition was challenged pursuant to *The Controverted Elections Act*, R.S.S., 1953, ch. 5, s. 10(d) which is identical to the current CEA s. 11(d). It was alleged that the deputy returning officer and returning officer failed to comply strictly with all procedures specified in *The Saskatchewan Election Act*, R.S.S. 1953, ch. 4 with respect to the poll statements. The Court of Appeal then quoted from the then s. 145 (which is similar to EA s. 175) and stated at p. 673, that the clear inference is that:

> ...it must be shown to the satisfaction of the court that the election was not conducted in accordance with the principles of the Act and that such non-compliance did affect the result of the election. The onus for establishing these two requirements rests upon the petitioner. That being so, the petition must include not only the allegations of irregularities but also allegations of the effect thereof on the election. In other words, the ground and facts alleged in the petition must be such that, if substantiated, the election would be set aside. If it does not do so, then the court, under sec. 10(d) [now CEA s. 11(d)] should direct that it be set aside and removed from the court files. The petition in respect to Baker does not, in my opinion, meet the requirements as I have stated them to be.

29 Therefore, the guiding principles to be applied in this application by Lorje pursuant to s. 11(d) are:

> 1. The court will approach its jurisdiction over an election contest with great caution;
>
> 2. The petition must disclose on its face sufficient grounds to set side the election or declare it void, i.e.:
>
> (a) that the election was not conducted in accordance with the principles of the Act; and
>
> (b) non-compliance with the Act affected the result of the election.

30 Accordingly, in the context of the above principles established in the case authorities and the statutory provisions of the CEA and EA the alleged facts and grounds in paragraph 10 of the petition must be examined.

Petition paragraph 10(a)(i)

31 This complaint is that in nine polls (4, 22, 24, 26, 30, 32, 43, 44 and Advance), the deputy returning officer did not initial the large brown envelopes which hold the smaller white envelopes containing the ballots. This is a complaint which is an irregularity because the EA s.141(21) prescribes this procedure. However, it does not in any way affect the validity of the ballots or the votes. The recount judge noted in his conclusion (para. 10, *infra*) that this non-compliance was minor and did not prejudice any of the parties within the meaning of s. 170(b) of the EA. Accordingly, the ballots should be counted.

Petition paragraph 10(a)(ii)

32 In poll 20, 6 ballots did not have the initials of the deputy returning officer. The recount judge in paragraph 12 of his decision stated that these 6 ballots "were ... rejected by me". Paragraph 8 of his decision shows 6 ballots under the rejected column.

Petition paragraph 10(a)(iii)

33 In Poll 40, 2 ballots did not have the initials of the deputy returning officer. The recount judge

in paragraph 12 of his decision stated that "2 ballots were rejected by me" because of this. Paragraph 8 of his decision shows 3 ballots under the rejected column.

Petition paragraph 10(a)(iv)

34 In poll 24 the small white envelopes were not enclosed in the large brown envelope as required by s. 141(20)(a) of the EA. These votes were included in the count. Again this is not a question respecting the validity of the ballots and the ballots were included in the count. This is a matter that involves the count and could have been subject to the appeal filed with respect to the count. The submissions were heard by the recount judge. The candidate who said these ballots should not be counted filed the appeal and did not raise it as a ground of appeal. Nor was the issue raised on a crossappeal. I agree with the conclusion of the recount judge that this is a minor error. This is the kind of administrative error contemplated by s. 175(a) of the EA and it should not invalidate the election.

Petition paragraph 10(a)(v)

35 In poll 44 the majority of the ballots did not bear the initials of the deputy returning officer but rather the initials of some unknown person. This is an error which can affect the validity of the votes. However, in his decision the recount judge carefully set out the numbers of ballots actually affected. The recount judge stated:

> ...of the 47 ballots cast for ... Karwacki, 22 had the [DRO] initials ... 25 ballots had the initials of someone other than the [DRO]...
>
> ...of the 78 ballots cast for ... Lorje, 30 had the [DRO] initials ... and 48 did not...
>
> ...of the 35 ballots cast for ... Reaburn, 13 had the [DRO] initials ... and, 22 did not...

If one eliminates the ballots which did not have the deputy returning officer's initials, then the vote count in poll 44 would be reduced as follows: Karwacki 47 - 25 = 22 votes; Lorje 78 - 48 = 30 votes; and Reaburn 35 - 22 = 13. This would change the final numbers in the vote count to: Karwacki - 3109; Lorje - 3124; Reaburn - 1965.

Petition paragraph 10(a)(vi)

36 In the advance poll, the small white envelopes contained a mixed combination of ballots cast for all candidates rather than the ballots cast for individual candidates. Again this is an administrative act contemplated by the provisions of s. 175 of the EA. Again there appears to be no question of the validity of the ballots and the recount judge noted in paragraph 12 of his decision that he placed all of the ballots in their proper envelopes and credited the candidates with the votes cast for them. As noted by the recount judge, this illustrates a sloppy manner in which the election was conducted. However, the carelessness of officials should not so easily disenfranchise voters who have properly cast their ballots and since no prejudice could be shown to any party nor any question raised about the validity of the ballots, this cannot cause the election to be set aside.

Petition paragraph 10(a)(vii)

37 In the absentee poll the returning officer separated the certificates from the ballots prior to inspection. There was no way then of ensuring their validity or authenticity in contravention of s. 89 (2) of the EA. He concluded that the absentee ballots should not be counted as they could not be validated. The absentee ballots recorded were 26 in total allocated as follows: Karwacki - 6; Lorje - 12; Reaburn - 8. If one excludes these ballots then the final vote count for each candidate would be (including the excluded votes in para. 10(a)(v) of the petition): Karwacki - 3103; Lorje - 3112; Reaburn - 1957.

Petition paragraph 10(b)

38 It is alleged that cumulatively the irregularities enumerated in paragraph 10(a) provide no indicia of reliability and fairness. This is a conclusion but it is the underlying facts which must establish the undue election. If all the irregularities combined do not affect the outcome of the election then the petition must stand dismissed. As is seen from the above analysis, the result of the election is unaffected by those matters which were albeit administratively not in compliance with the specific provisions of the EA but those matters did not affect the outcome of the election.

Petition paragraph 10(c)

39 It is alleged that the irregularities noted in paragraph 10 adversely affected 2,479 votes. In the polls that the problems and non-compliances were pointed out and examined and addressed by the recount judge, it is inaccurate to say the effect on the votes was adverse. Sections 170 and 175 of the EA are clear in their direction that informalities, and irregularities that do not prejudice the parties do not invalidate the election.

Petition paragraph 10(d)

40 It is alleged that 103 ballots were cast and counted which did not contain the initials of the deputy returning officer. As noted above in paragraph 10(a)(v) because of the careful manner in which the recount judge set out all of the issues in his recount decision, it is apparent that these 103 ballots can be discounted if necessary and the outcome of the election is not affected.

Petition paragraph 10(e)

41 It is alleged that no deputy returning officer shall "knowingly" omit to put his initials on the back of a ballot paper. While that provision in EA s. 207(1)(a) specifies this as a neglect of duty, only conduct within EA s. 207(1)(b) is defined as a corrupt practice. There are no facts asserted in the petition which in any way establish that the deputy returning officer "knowingly" omitted to put his initials on the back of the ballot paper. The petitioner must state a fact(s) before this can be considered as a ground for the trial of the petition.

Petition paragraph 10(f)

42 It is alleged that the margin of victory is unknown. Again, any issue with the recount entitled the parties to appeal the recount and the appeal judge then could have conducted the same. There was no issue with the vote count raised on appeal. Pursuant to s. 37 of the CEA, it is not possible for a recount to be conducted by the judge hearing any application or trial under the provisions of the CEA. The recount judge was directed by the Court of Appeal judge to certify the vote count. It was certified at a margin of 38. This is conclusive of the vote count. While the matters legitimately raised which challenged items of the vote (as distinguished from administrative irregularities) would at best only reduce the margin of votes, i.e. polls 20, 40, 44 and absentee vote it would not change the outcome of the election.

Petition paragraph 10(g)

43 It is alleged as a matter of public policy the courts must not condone irregularities. As stated earlier, the court's jurisdiction in election matters is set out in the EA and the CEA and this Court is obliged to give effect to the legislative enactments and must not strain the interpretation so as to disenfranchise voters and the outcome of the election. The CEA and the case authorities make it clear that the petitioner must satisfy the onus that the facts alleged would affect the outcome of the election. The will of the electorate as expressed by their votes in the election is not to be lightly interfered with. It is the obligation of the court to insist on strict compliance with the legislative provisions of the CEA. The legislators decided that only where the result of the election would be affected should there be a trial of the issue raised by the petition.

Petition paragraph 10(h)

44 This again is a conclusion of an adverse affect on the election by reason of irregularities and it is

merely a conclusion and summary of what has been said before in paragraph 10. No new facts or grounds are alleged which would affect the election.

45 To summarize the above, the issues raised in the petition paragraph 10(a)(i) (polls 4, 22, 24, 26, 30, 32, 43, 44, and Advance Poll) are irregularities. The recount judge did not make any specific finding that any party was prejudiced by these administrative irregularities (see EA s. 170(b)). The ballots were properly marked and accounted for. Unless the irregularity affects the result of the election, no election is to be declared invalid (see EA s. 175).

46 Here the irregularities were administrative and did not put the validity of the ballots on the vote count of those ballots in doubt. Accordingly, by applying EA ss. 170 and 175, this fact or ground cannot affect the result of the election.

47 Accordingly, only the issues raised with respect to polls 20, 40, 44 and the absentee vote can potentially affect the outcome of the election.

48 Because of the constraints imposed by the CEA (s. 37) and EA with respect to the vote count and because of the appeal procedures which are now completed, the only other recourse to the judge acting under the provisions of the CEA is to interpret the decision of the recount judge so as to implement his findings with respect to the specific polls and apply his conclusions on each of the disputed polls and complete the addition of the votes.

49 On this application, I am required to look at the recount decision and appeal decision and determine if the grounds in the petition affect the election. Applying the findings and conclusions of the recount judge in the four polls, i.e. 20, 40, 44 and absentee, the result is as follows:

Karwacki Lorje Reaburn Majority

Margin

Certified vote 3134 3172 1987 38

Deduct Poll 44 (para. 10(a)(v) infra) (-25) (-48) (-22)

3109 3124 1965 15

Deduct Absentee Poll (para. 10(a)(vii) (-6) (-12) (-8)

infra)

3103 3112 1957 9

Deduct (Polls 20 and 40 = 8 ballots (-8)

assume all in favour of majority)

3103 3104 1957 1

50 Assuming the worst case scenario on polls 20 and 40 against the candidate with the most votes, as can be seen above, there is still a margin of victory in favour of Lorje of one vote.

51 If the recount judge's judgment cannot be interpreted and assuming all the votes in polls, 44, Absentee, 20, and 40 must be discounted, the effect is:

Karwacki Lorje Reaburn Margin of Victory

Poll 44 3134 3172 1987

(-47) (-78) (-35)

3087 3094 1952 38

Absentee (-6) (-12) (-8)

3081 3082 1944 7

Poll 20 (-92) (-76) (-31)

2989 3006 1913 17

Poll 40 (-37) (-53) (-50)

2952 2953 1863 1

52 Again, the margin of victory is one vote in favour of Lorje.

53 In my view, it is contrary to the duty imposed on the court under the CEA to take a simplistic approach and to say now that the number of affected votes in the four polls (20, 40, 44, absentee) number 525 and exceed the margin of victory of 38 and order a trial. The prior proceedings in this case in the recount and appeal therefrom dictate otherwise. The controverted judge cannot count ballots. The numbers of votes counted by the recount judge must stand. In the worst case scenario there would be a margin of victory of one vote.

54 Accordingly, the petitioner has failed to set out sufficiently facts and grounds which would, if proved to be true, affect the outcome of the election. Therefore, as stated in *Gross*, *supra*, and s. 11 (d) of the CEA, it is the duty of this Court to dismiss the petition.

55 The application is dismissed with costs which I fix at $600.00.

Application granted.

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